Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

VERNON FLOYD,
Petitioner

V.

FEDERAL COMMUNICATIONS COMMISSION
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the District of Columbia Circuit err in its standard of review in upholding a Federal Communications Commission award of a new FM broadcast license decision based on vague and ambiguous financial requirements and which did not follow established precedent or relevant statutory and constitutional standards for reasonableness and procedural due process.

PARTIES TO THE PROCEEDING

Appellant:
Vernon C. Floyd

Appellee:
Federal Communications Commission

Intervenors in the Court of Appeals

Miracle Radio, Inc.
David Earl Hoxeng, d/b/a ADX Communications of Pensacola

Other Interested Party:

Pensacola Radio Partners

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Pensacola Radio Partners Initial Decision,
FCC 93D-19 released October 4, 1993

Pensacola Radio Partners
Memorandum Opinion and Order, FCC 91-M-3483
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Pensacola Radio Partners
Hearing Designation Order, DA 90-1136
released September 24, 1990

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. Sec. 1254. Appellant was a party below and is aggrieved by the final order of the Federal Communications Commission and thereafter said Order affirmed by the United States Court of Appeals for the District of Columbia Circuit.

This matter involves an appeal from United States Court of Appeals for the District of Columbia Circuit. This court has jurisdiction over this appeal. The date of entry of the judgment sought to be reviewed is June 24, 1999.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

UNITED STATES CONSTITUTION

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 USCA Section 706

GOVERNMENT ORGANIZATION AND EMPLOYEES -- JUDICIAL REVIEW

STATEMENT OF THE CASE

This proceeding involves mutually exclusive applications for a new FM construction permit to operate on Channel 254c2 to serve Pensacola, Florida. The appellant, Vernon Floyd filed his application to obtain a construction permit to build a new FM station on March 24, 1988. As of September 24, 1990, a total of twenty-seven applicants were originally designated for hearing.

On September 24, 1993, Judge John M. Frysiak, Administrative Law Judge issued an initial decision and found Vernon Floyd was financially disqualified. See **Pensacola Radio Partners**, of FCC R.Ed 7225 (ALJ).

In 1994 the proceeding was frozen by the Commission's Public Notice, **FCC Freezes Comparative Proceedings**, 9FCC Red 1055 (1994). The freeze was later removed.

Vernon Floyd appealed the initial decision of the Administrative Law Judge to the Federal Communication Commission. The Federal Communication Commission on May 12, 1998 affirmed the denial of the application of Vernon C. Floyd for lack of financial qualification.

Vernon Floyd in 1998 appealed to the United States Court of Appeals for the District of Columbia Circuit. In March, 1999 the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Federal Communications Commission. Vernon Floyd's motion for reconsideration was denied on Jun 24, 1999.

Vernon Floyd appeals the entire process to the Supreme Court of the United States.

Between September 24, 1990 and September 24, 1993 a series of hearings were held on various issues surrounding the applications of the four surviving applicants, Vernon C. Floyd, Pensacola Radio Partners ("'PRP"), Miracle Radio, Inc. ("Miracle") and David Early hoxeng, d/b/a ADX Communications of Pensacola ("ADX"').

Vernon C. Floyd is a veteran in radio broadcasting, having been involved in various aspects of the business since 1953. He is presently, and was at the time of his application for license for the new FM construction permit, the owner of two radio stations located in Hattiesburg, Mississippi. Vernon Floyd has owned and been the general manager of his AM station in Hattiesburg since 1969 and of the FM station since 1982. Floyd himself has been solely responsible for the construction of both his stations from drafting operational and architectural plans to purchase and installation of the technical equipment.

When Floyd prepared the initial application for the new FM construction permit to operate on Channel 254C2, Pensacola, Florida which was filed on March 24, 1988, he had to his credit thirty-five years of broadcast experience which included almost twenty years of ownership experience. This expertise was used in developing the required budget to construct and operate the proposed facility for three months without revenue. Floyd obtained a written equipment proposal and conducted an inventory of surplus equipment and prepared an itemized list of equipment needed to construct the Pensacola facility. Since Floyd knew the complexity of the

process of applying for a new license he prudently consulted counsel to discuss the budget and formulate detailed cost estimates for the proposed Pensacola facility which figures counsel later reduced to writing. No issues were enlarged at the FCC comparative hearing in relation to Floyd's budget for the facility, and the budget of $260,527 accepted with little question.

The enlargement of issues arose in relation to Vernon Floyd's financial qualifications and misrepresentation as to his financial qualification. There was also an issue as to Floyd's site availability which was resolved in his favor. But for the financial issue, Floyd was, by virtue of his 100% quantitative integration credit enhanced by his minority status, and broadcast experience, a very slight comparative coverage preference and the fact that Floyd proposed to divest himself of his current broadcast interests, the superior applicant for being awarded the new construction permit. Floyd was also superior in his financial qualifications in that he was the only applicant who did not rely on third party financing to construct the station, instead Floyd chose to rely on his own sufficient personal resources to finance the construction and operation of the station.

Floyd's intimate knowledge of the business allowed him to formulate a budget with minimal contribution from outside sources. Floyd's intricate knowledge of his personal finances provided the "reasonable assurance" required by the FCC in certifying that he met the financial qualifications to be awarded the FM construction permit. However, Floyd reviewed his financial situation and discussed with counsel his intent to sell his Hattiesburg, Mississippi stations to provide the bulk of the

funding for the new station. Floyd also had $146,000 in cash in various checking accounts which was to be used as a secondary source of funding. All that was required of an applicant financially in filing the initial applicant at the time Floyd submitted FCC form 301 in 1988 was that the applicant have a "reasonable assurance" that he had adequate funding to construct the new station before certifying on the application that he was financially qualified and that if questioned he could provide documentation to the FCC reflecting those qualifications. There was no requirement that the financial documentation exist contemporaneous with the date of certification on the initial application.

Floyd valued his two existing stations together at roughly $500,000 to $550,000 taking into consideration the annual cash flow of approximately $130,000 produced by the stations, the fact that the stations had historically been highly rated in the market and his expectation that based on the conditions of the marketplace his stations could be sold with ease. Knowing that he would need a valuation from an appraiser if there was a question regarding his financial qualification, Floyd secured an appraiser on the day he prepared the application and indicated in the application that he was in the process of securing documentation of his funding sources. This was done in good faith with no attempt to conceal the fact that the written appraisal was not yet in existence. In fact, the ALJ concluded in the initial decision that there was no misrepresentation by Floyd regarding his financial qualification. What the ALJ failed to find was that Floyd complied with the then-existing financial requirements at the level of the initial application.

In the ensuing years Floyd's financial qualifications continued under attack in the comparative hearing process where each applicant is forced to seek enlargement of issues against other applicants, not to more closely scrutinize the other applicant's qualifications or narrow the scope of the issues, or for any other judicious or expedient reason but only to jockey for a superior position in the application process. This is done because the license Floyd and the other applicants were seeking is a valuable prize. Yet the battle in which the applicants are forced to engage is less a determination of the best qualified applicant and is more a reflection of to what length an applicant is willing to go to win the prize. There was in Floyd's case as there are in many other cases, almost as a matter of course, allegations of intentional misrepresentation of information usually financial information.

The FCC was willing to liberally extend the definition of "reasonable assurance" of financial qualification in relation to Pensacola Radio Partners (PRP), the applicant that was awarded the license. PRP provided a financing letter from a bank that was placed into conservatorship early in the application process. The FCC was willing to accept that PRP had no knowledge of the bank's diminished status and consequent threat to PRP's financing until so informed by Floyd in a motion filed during the comparative proceeding.

The degree of discretion of the fact-finder in the comparative hearing process is violative of statutory and constitutional authority. The decision in the instant case was without an evidentiary basis.

ARGUMENT

The United States Court of Appeal for the District of Columbia Circuit noted the vagueness of the agency's requirement for determining financial qualifications, nevertheless, the United States Court of Appeals for the District of Columbia affirmed the Federal Communication Commission decision on the basis that the Commission had reasonable grounds for its conclusion. Is the standard of review applied by the United States Court of Appeal for the District of Columbia Circuit is consistent with standard statutory and constitutional law.

The standard of review is set out in Section 706 of the Administrative Procedure Act, 5 U.S.C.A. Section 706 which provides as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be:

> a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

b. Contrary to constitutional right, power, privilege, or immunity;

c. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

d. Without observance of procedure required by law;

e. Unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statue; or

f. Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Commission's Order was not supported by substantial evidence. Vernon Floyd testified that he owned his AM transmitter site, his studio site, his FM transmitter site, and all of his broadcast equipment and that the FM equipment was purchased new in 1982. Vernon Floyd presented copies of bank statements as of the date of certification of his financial qualifications showing that he had over $146,000.in cash in the bank. Vernon Floyd further presented evidence of a home and other investments owned free and clear of indebtedness in a net minimum of $350,000 to $400,000. Vernon Floyd's testimony was supported by expert testimony.

The Commission, nevertheless, ruled that Vernon Floyd was financially disqualified. The Commission's actions were inconsistent with precedent and not supported by substantial evidence.

The rules governing financial requirements changed over the period of time prior to the ALJ initial decision.

In 1981, the Commission revised FCC Form 301, used to apply for new broadcast stations, replacing the requirement of detailed financial documentation with a certification procedure whereby the applicant was called upon to answer the following questions either by checking "yes" or "no".

> The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

Revision of Form 301, 50 RR 2D 381, 3 82 (1981). This

rule governs applications filed between 1981 and 1989. **Northhampton Media Associates v. FCC**, 941 F.2d 1214 (D.C. Cir. 1991). In order to establish that it has "reasonable assurance," an applicant must, at the time of certification, have "reasonable and reliable evidence that the necessary funds would be available." (Applicants need not have in hand such documentation when certifying their financial qualifications; instead, they can prepare and submit such documentation after certification when requested to do so by the Commission.) **Port Huron Family Radio, Inc.**, 5 FCC Red 4562 (1990). Floyd clearly had "reasonable and reliable evidence that the necessary funds would be available" at the time of certification and the Commission's conclusions to the contrary are not supported by substantial evidence, and are inconsistent with Commission and Court precedent, and are arbitrary and capricious.

Floyd filed his application in 1988 and therefore the revised Form 301 (1981) should govern his financial qualifications.

Under the revised Form 301 (1981), once an applicant checks it is financially qualified, there is usually no basis for the staff or the ALJ to designate a financial issue, nor is there generally a basis for any other party to seek discovery on financial qualifications. The Initial Decision of the FCC did not comply with revised Form 301 (1981). The ALF's Initial Decision complied with the revised Form 1989 which required the applicant "must provide substantial and reliable evidence" of financial qualification. The FCC applied Form 301 (1989) retroactively to Floyd, this constituted a violation of Floyd's right to due process rights procedural.

Moreover, the FCC in its determination of partial settlement and non-settling parties, in Floyd's case decided adverse to the standard precedent.

The FCC has approved several cases wherein partial settlements were involved. In **Global Information Technologies, Inc.** FCC 97-268 (Full Commission, rel. August 4, 1997), the non-settling parties had their exceptions considered and adjudicated before the Review Board. However, the contrast in Floyd's case is that Floyd has not had his exceptions considered by the Review Board or by any other Commission authority.

Further, in **Gonzales Broadcasting**, Inc., 97-283 (Full Commission, rel. August 12, 1997), again the non-settling parties had already been awarded a full Review Board adjudication of their exceptions.

In comparison to the District of Columbia Circuit, in **Cook v. Heckler**, 750 F.2d 391 (1985), the Fifth Circuit Court of Appeals held that "if substantial evidence supports the administrative finding, Court of Appeals may then only review whether the administrative law judge applied the proper legal standard and conducted the proceeding in conformity with the applicable statutes and regulations; however, the standard of review is not a rubber stamp for decision and involves more than a search for evidence supporting findings but, rather, the court must scrutinize the record and take into account whatever fairly detracts from the substantiality of the evidence supporting findings."

Further, applicants for broadcast licenses as well as indi-

viduals seeking rulings on any federal agency determination should expect a consistent standard of review which involves more than a search for evidence supporting findings, but, rather the court must scrutinize the record and take into account whatever fairly detracts from the substantiality of the evidence supporting findings.

The theory of the standard comparative issue is that the Federal Communications Commission determines, before setting a case for a hearing, that each license applicant has the minimum character, legal, financial, and technical capability to operate a television station in the public interest, with the purpose of the hearing being to determine, on that basis, which applicant would serve the public interest better. **Fidelity Television, Inc.** v. FCC (D.C. Cir. 1975)

In reviewing Federal Communications Commission's decisions at comparative hearings, the Court of Appeals' function is a limited one: it is necessary only that the Court satisfy itself that the FCC acted within the bounds of its statutory and constitutional authority, that it followed its own procedural rules and regulations, that its fact-findings are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions do not deviate greatly from past pronouncements without sufficient explanation, and that in general it has engaged in reasoned decision-making. **Communications Act of 1934.** Section 307(a), 47 U.S.C.A. s 307(a).

Finally, Commission failure to follow precedent and regulation was sufficient evidence to justify the Appeal Court overturning its Initial Decision.

The FCC has failed to comply with its own precedent, regulations and constitutional law as applied to Floyd. First, the Commission did not properly resolve the issue as related to Floyd, as a nonsettling party. That the precedent established, clearly recognizes a Full Review Board hearing on disqualification prior to the Commission hearing. Secondly, the Commission applied Form 301 (1989) retroactively to Vernon Floyd's financial qualifications. In doing so, the Commission violated Floyd's constitutional right to a fair hearing.

Finally, the financial qualification procedures and vague and ambiguous. Thus, an appeal court applying the proper standard of review should have determined that the Commission's actions were in violation of precedent and statutory and constitutional law.